

LAW OFFICES
GINSBURG, FELDMAN AND BRESS
CHARTERED
1250 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20036
TELEPHONE (202) 637-9000

CORRESPONDENT OFFICE
9, RUE BOISSY D'ANGLAS
75008 PARIS, FRANCE

RECEIVED

APR 19 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

JAY S. NEWMAN
ASSOCIATE
(202) 637-9114

TELECOPIER (202) 637-9195
TELEX 4938614

April 19, 1995

VIA HAND DELIVERY

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

Re: Cable Home Wiring, MM Docket No. 92-260

Dear Mr. Caton:

In accordance with Section 1.200 et seq. of the Commission's rules, this is to advise that on Wednesday, April 19, 1995, I sent the attached letter to John Nakahata, Special Assistant to the Chairman. An original and four copies of this letter are enclosed herein for inclusion in the above-referenced docket.

Sincerely,



Jay S. Newman
Counsel for Liberty Cable
Company, Inc.

Enclosures
JSN:cas

No. of Copies rec'd 024
List A B C D E

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JAY S. NEWMAN
ASSOCIATE
(202) 637-9114

TELECOPIER (202) 637-9195
TELEX 4938614

April 19, 1995

Via Hand Delivery

Mr. John Nakahata
Special Assistant to
The Chairman
Federal Communications
Commission
Room 814
1919 M Street, NW
Washington, DC 20556

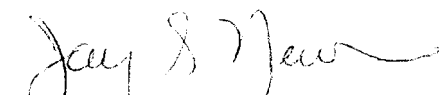
DOCKET FILE COPY ORIGINAL

Re: Ex Parte MM Docket No. 92-260

Dear Mr. Nakahata:

Enclosed is a letter which was filed with the Commission on January 13, 1995 and which discusses Liberty Cable Company, Inc.'s position in the cable inside wiring proceeding. I thought it may be of interest to you in preparation for our upcoming meeting.

Sincerely,


Jay S. Newman
Counsel for Liberty Cable
Company, Inc.

Enclosure

JSN:cas

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GINSBURG, FELDMAN AND BRESS
CHARTERED
1250 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20036
TELEPHONE (202) 637-9000

TELEX CORRESPONDENT OFFICE TELECOPIER
4938614 9, RUE BOISSY D'ANGLAS (202) 637-9195
75008 PARIS, FRANCE

January 13, 1995

WRITER'S DIRECT DIAL NUMBER

JAN 13 '95
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

VIA HAND DELIVERY

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: Response to Ex Parte Letter --
Cable Home Wiring, MM Docket No. 92-260

Dear Mr. Caton:

In accordance with Section 1.1200 et seq. of the Commission's rules, Liberty Cable Company, Inc. ("Liberty") hereby submits this response to the December 5, 1994 ex parte letter filed by Time Warner Entertainment Company, L.P. ("Time Warner") in this proceeding ("ex parte letter"). While this letter will not address each issue and allegation raised by Time Warner in its ex parte letter, Liberty will, upon Commission request, respond to any of the issues and allegations not addressed herein. In addition, Liberty hereby affirms the veracity of all the statements contained in its November 14, 1994 ex parte letter filed in this proceeding, and is prepared, upon request, to provide the Commission with evidence to support each of these claims.

I. Liberty's Position In The Home Wiring Proceeding Is Consistent With The Intent Of Both Congress And The Commission Regarding The Cable Inside Wiring Rule

In its ex parte letter, Time Warner challenges Liberty's proposed demarcation point for cable inside wiring^{1/} by arguing

^{1/} As discussed more fully in Liberty's other filings in this proceeding, Liberty believes that the Commission should locate the demarcation point for cable home wiring in multiple dwelling units ("MDUs") at that point where an individual dedicated
(continued...)

Mr. William F. Caton
January 13, 1995
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that the proposal is inconsistent with the 1992 Cable Act.^{2/} Time Warner argues that, according to the 1992 Cable Act and the accompanying House Report, the home wiring provisions only apply to wiring physically located within a subscriber's apartment.^{3/} Time Warner's narrow interpretation of the inside wiring provisions is, itself, contrary to Congress' intent in enacting the 1992 Cable Act (i.e., promoting competition in the video marketplace) as it would thwart Congress' efforts to allow alternate providers access to existing cable inside wiring without disrupting the interior of a subscriber's home.^{4/} The Commission rejected this interpretation of the statute when it originally set the demarcation point "at (or about) twelve inches outside of where the cable wire enters the outside wall of the subscriber's individual dwelling unit".^{5/} The FCC certainly would not have set the demarcation point outside a subscriber's apartment if it thought that the statute itself restricted the Commission from choosing such a location as the demarcation point.

While the statute directs the Commission to adopt rules to govern the disposition of "cable installed by the cable operator

^{1/}(...continued)
subscriber line ("Individual Line") connects to the common wiring ("Common Line").

^{2/} The Cable Television and Consumer Protection Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992).

^{3/} See Time Warner Ex Parte Letter, dated December 5, 1994 at 3-4.

^{4/} H.R. Rep. No. 628, 102d Cong. 2d Sess. at 118 (1992) ("House Report").

^{5/} Implementation of Cable Television Consumer Protection and Competition Act of 1992 -- Cable Home Wiring, Report and Order, MM Docket No. 92-260 (released February 2, 1993) ("Inside Wiring Order") at ¶¶ 11 and 12 (emphasis added). Although Time Warner questions the Commission's authority to set the demarcation point outside a subscriber's apartment, Time Warner also seems to accept that the Commission has this authority when it expresses its support for the current rule setting the demarcation location at a point approximately twelve inches outside of an apartment. See Comments of Time Warner at 2.

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January 13, 1995
Page 3

within the premises of [the] subscriber",^{6/} the statute does not specify or restrict where the demarcation point may be, nor does it even refer to wiring within MDUs. In addition, the only reference in the legislative history that even mentions MDUs is a statement contained in the House Report which provides: "In the case of multiple dwelling units, this section is not intended to cover common wiring within the building, but only the wiring within the dwelling unit of individual subscribers".^{2/} Again, the House Report does not specify or restrict where the Commission may locate the demarcation point.

Moreover, Congress' use of the word "common" to modify the phrase "wiring within the building" is significant. Specifically, the terminology used by Congress is further evidence of Congress' intent not to limit the applicability of the home wiring rules (as Time Warner suggests) by implicitly distinguishing between "common wiring located within the MDU" and "dedicated wiring located within the MDU". Indeed, if Congress had wanted to limit the applicability of its rules solely to those wires physically located within the four walls of an apartment, it would not have referred to "common wiring".

Thus, regardless of whether a Dedicated Line meets a Common Line at a location which is five inches, twelve inches, five feet or any other distance outside a subscriber's premises, Liberty believes that its proposed demarcation point is consistent with the intent of both Congress and the Commission regarding cable inside wiring.

Time Warner also argues that Liberty's proposal for passive equipment to be classified as cable inside wiring is contrary to Congress' intent. By way of background, Liberty filed a petition for reconsideration in this proceeding asking the Commission, among other things, to clarify that cable inside wiring includes passive ancillary equipment such as splitters, conduits and molding in

^{6/} 47 U.S.C. § 544(i). The statute does not, as Time Warner indicates, specifically state that "the home wiring rules are to apply to 'cable installed by the cable operator within the premises of [the] subscriber'".

^{2/} House Report at 118.

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which the cable is installed.^{8/} Liberty believes that the inside wiring provisions, as applied in the MDU context, were never intended to be interpreted as narrowly as Time Warner suggests. And it is imperative that the Commission recognize that access to the demarcation point may be further frustrated if passive equipment is not classified as inside wiring.

For example, if the Commission were to adopt Liberty's proposed demarcation point, but did not classify passive equipment as cable inside wiring, a cable operator could deny a competing service provider access to the junction box or other passive equipment so as to effectively deny the competing service provider access to the demarcation point. Therefore, at a minimum, the Commission should impose an obligation on cable operators to facilitate access to such equipment for the purpose of allowing alternate service providers to connect their Common Line to Individual Lines.

II. Liberty's Proposed Amendment To The Inside Wiring Rules Does Not Violate The Constitution Or State Laws

Time Warner argues that Liberty's proposed demarcation point is "statutorily unauthorized" and "violates the Constitution and state laws". While Liberty disagrees with each of these claims, this letter will only address some of Time Warner's allegations on this subject as previously noted.

First, for the reasons previously set forth by Liberty in its ex parte letter dated November 14, 1994, neither the current cable inside wiring rules nor Liberty's proposed amendment to these rules causes a "taking" of property. The rules merely regulate the disposition of individual dedicated lines upon termination of the cable operator's service.

Second, Time Warner complains about the burdens it would face if a subscriber who decided to switch from Time Warner service to

^{8/} Liberty Petition for Reconsideration in MM Docket No. 92-260. The Inside Wiring Order provides that cable inside wiring does not include "active elements such as amplifiers, decoder boxes or similar apparatus". Inside Wiring Order at ¶ 8. It is unclear from this definition whether passive ancillary equipment, such as splitters or conduits, is cable inside wiring.

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Liberty service, subsequently decided he or she also wanted to receive a new service offered by Time Warner while still receiving certain services from Liberty.^{9/} If Time Warner is truly concerned about this occurring, Time Warner could (prior to termination) inform the terminating subscriber that once Time Warner's service is terminated, there may be an additional installation charge if that subscriber eventually wants to receive a future service offered by Time Warner.

Third, Time Warner believes that Liberty's proposed demarcation point is somehow "not reciprocal or evenhanded".^{10/} Time Warner is correct in stating that "cable operators can never use the rule to take over facilities installed by a SMATV operator, MMDS, DBS or Video Dialtone provider who has wired buildings"^{11/} since Congress expressly limited the applicability of its inside wiring provision to "cable installed by ... [a] cable operator".^{12/} However, nothing in the current rule or in the rule proposed by Liberty would prohibit Time Warner from utilizing the facilities which a cable operator had originally installed if the subscriber wanted to switch back to Time Warner's service.

III. Miscellaneous Issues

A. Time Warner Exaggerates The Costs Associated With Installing The Internal Wiring

Time Warner complains about the tremendous costs it and other cable operators have incurred in "wiring the nation", and its inability to recover the labor costs associated with this wiring through installation charges.^{13/} The labor cost associated in installing these wires are not as high as Time Warner would like the Commission to believe. In New York City, Time Warner typically paid \$30.00 per apartment to have cable pulled through conduits

^{9/} See Time Warner Ex Parte letter at 10.

^{10/} Id.

^{11/} Id. at 11.

^{12/} See 47 U.S.C. § 544(i).

^{13/} See Time Warner Ex Parte Letter at 3-5.

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from the apartment to the junction box.^{14/} It is this cable which should be included in the cable home wiring definition. It is incredible that Time Warner -- which had no rate regulation for years -- has been unable to recoup the \$30 per apartment cost over the years it provided monopoly service.

A subscriber may acquire the inside wiring at its replacement cost. While subscribers could certainly purchase the inside wiring themselves, Liberty would be willing to pay this fee on behalf of subscribers in the same way that telephone long distance carriers are willing to pay the fees which local exchange companies charge consumers to switch long distance providers.

B. Time Warner Fails to Demonstrate The Accessibility Of The Current Demarcation Point

Without substantiating the statistics it provides as to the number of buildings which employ a conduit architecture (where cables are inaccessibly buried in floors or walls), and without providing any evidence to show that internal wiring located in either conduits or hallway moldings is in fact easily accessible, Time Warner baldly asserts that "MDUs where the wiring is inaccessible without causing significant physical damage to the building are the exception rather than the norm in New York City."^{15/} Since most new MDU construction utilizes the conduit architecture and since recent trends indicate that the percentage of new residential construction which involves MDUs is increasing, it is imperative that the Commission adopt Liberty's proposed demarcation point.^{16/} Otherwise, the access problems which Liberty described in its prior filings in this proceeding will only worsen.

Time Warner further asserts that "landlords typically receive handsome compensation from unfranchised MVPDs based on a percentage

^{14/} Attached herewith is an invoice and purchase order for Time Warner's predecessor, Teleprompter Corporation.

^{15/} Time Warner Ex Parte Letter at 6.

^{16/} According to statistics provided by a representative of the National Association of Home Builders, whereas 13% of the 1,288,000 new residential units constructed in 1993 were MDUs, it is estimated that 18% of the 1,440,000 new residential units constructed in 1994 will be MDUs.

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January 13, 1995
Page 7

of their revenues from the building" and thus have "a strong incentive" to allow hallway molding and exterior installations.^{17/} Liberty does not pay such compensation; in fact, its customers rigorously object to unsightly, disruptive and duplicative cable wiring in their apartments and corridors.

C. Time Warner's Justification For Its Litigious and Anti-Competitive Behavior Is Meritless

Liberty previously asserted that Time Warner frequently claims ownership and control over wires it does not own and then files multimillion dollar lawsuits over that wiring in a baseless attempt to scare away Liberty's customers.^{18/} In its ex parte letter, Time Warner attempts to justify its behavior by alleging that these lawsuits were initiated to protect Time Warner's equipment and "occasioned by Liberty's illegal and tortious conduct at apartment buildings controlled by Liberty."^{19/}

Time Warner's claim that it brought these actions against MDU owners in order to protect its equipment is utterly baseless. And, Time Warner's charges that it is Liberty's "typical modus operandi" to "tortiously convert Time Warner's equipment, recklessly cut-off service to customers who continue to desire to receive service for Time Warner, [and] engage in shoddy engineering practices" are patently false as well as defamatory. Liberty has never knowingly or intentionally denied a MDU resident access to Time Warner's service when that resident wanted Time Warner's service. In those few cases where Liberty's technicians may have inadvertently disconnected a Time Warner subscriber, the error was rectified quickly.

Moreover, there are at least two glaring gaps in Time Warner's stated rationale as to why it brought these lawsuits. First, Time Warner has never sued Liberty. If Time Warner was truly concerned about Liberty's tortious activity, then why were the actions brought against MDU owners? Second, if Time Warner simply wants to protect its equipment, then what rationale (other than to scare off

^{17/} Time Warner Ex Parte Letter at 8.

^{18/} See Liberty Ex Parte Letter at 8-10.

^{19/} Time Warner Ex Parte Letter at 12.

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Page 8

other potential Liberty customers) did Time Warner have in seeking such significant punitive monetary damages for MDU owners?

To further besmirch Liberty, Time Warner infers that Liberty possesses and utilizes its control over buildings to which it provides service so as to hinder Time Warner from installing new equipment in those buildings.^{20/} While Liberty has entered into exclusive contracts with various MDU owners, these contracts in no way prohibit Time Warner from offering its services to MDU residents as required by state law. These contracts are exclusive only to the extent that MDU owners cannot receive video services from other non-franchised MVPDs, so that Liberty may recoup its substantial investment over a limited period of time.

Time Warner tries to tie together two issues that should be treated separately -- cable home wiring and exclusive contracts in MDUs. The Commission can and should examine the legitimacy of exclusive cable service contracts at multifamily properties by both cable operators and non-franchised MVPDs. To that end, Liberty will be submitting to the Commission, within the next thirty (30) days, a petition for rulemaking to establish rules for equal access to multifamily buildings by MVPDs. Liberty will ask the Commission to adopt rules that ban exclusive cable service contracts to MDUs and preempt state cable access laws that discriminate between franchised and non-franchised MVPDs.^{21/} That rulemaking -- and not reconsideration of the cable home wiring rules -- should be the vehicle for addressing contract exclusivity.

^{20/} Time Warner correctly states that Liberty often pays the attorney fees which MDU owners incur to defend against the Time Warner suits. Contrary to Time Warner's insinuations, however, Liberty does this because of Time Warner's own campaign to harass MDU owners who signed contracts with Liberty. MDU owners quickly learned that they could be sued by Time Warner if they signed a contract with Liberty. Accordingly, MDU owners will only agree to receive Liberty's service if Liberty indemnifies them for the legal costs and damages of a lawsuit from Time Warner.

^{21/} In New York, Time Warner has guaranteed statutory access to every building served by Liberty pursuant to Executive Law § 828. However, Liberty does not have the same right of access to buildings served by Time Warner solely because Liberty has no franchise.

Mr. William F. Caton
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Page 9

Reconsideration of the cable home wiring rules addresses the mechanics of how a subscriber in a MDU can physically switch from one service provider to another. As Liberty has amply demonstrated, the only feasible way of accomplishing that physical switch is by setting the demarcation point where the individual line meets the common line. Whether contract exclusivity legally prohibits the switch is a separate question and should be addressed in a separate proceeding.

* * * * *

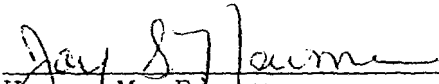
Based on the foregoing, and for the reasons set forth in Liberty's prior submissions to the Commission in this proceeding, Liberty respectfully requests that the Commission reconsider its demarcation point for cable inside wiring in MDUs.

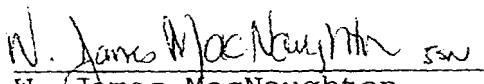
Respectfully submitted,

LIBERTY CABLE COMPANY, INC.

GINSBURG, FELDMAN AND BRESS,
CHARTERED

By:


Henry M. Rivera
Jay S. Newman
Suite 800
1250 Connecticut Avenue, NW
Washington, DC 20036
202-637-9000

 sw
W. James MacNaughton
Suite 610
90 Woodbridge Center Drive
Woodbridge, NJ 07095
908-634-3700

ATTORNEYS FOR
LIBERTY CABLE COMPANY, INC.

GINSBURG, FELDMAN AND BRESS
CHARTERED

Mr. William F. Caton
January 13, 1995
Page 10

cc: Julia Buchanan
Jennifer Burton
Richard Chessen
Lynn Crakes
Patrick Donovan
Marian R. Gordon
Meredith Jones
Jill Lockett
Olga Madruga-Forti
Mary McManus
Maureen O'Connell
Lisa Smith
Merrill Spiegel
Gregory Vogt
Larry Walke
John Wong

P347

F. GAROFALO ELECTRIC CO., INC.

ENGINEERS AND CONTRACTORS

150-42 12TH AVENUE

WHITESTONE, N.Y. 11357

(212) 767-0900

ELECTRICAL SERVICE FOR INDUSTRY

TO Teleprompter Corporation

388 Seventh Avenue

New York, NY 10019

INVOICE NO. #6892

DATE June 12, 1980

WORK ORDER NO.

Re: 95th Street & Third Avenue

Att: Marvin Fields

Install cable in existing conduit (one (1) outlet
per apartment unit-sketch) at 1680 Third Avenue, NYC,
as per your Purchase Order #103 - 13115.

\$8,400.00

Please mail us your Capital Improvement Certificate.

RECEIVED
JUN 16 1980
PURCHASING

TELEPROMPTER CORPORATION

P13

TERMS: _____
DELIVERY REQUIRED _____
SHIP VIA _____
QUOTED _____

888 SEVENTH AVENUE
NEW YORK, NY 10019
(212) 247-8700
ATTN: PURCHASING DEPT.

PAGE 1 OF 1
DATE TYPED 1/10/80

SHIP AND BILL TO:

TO VENDOR: F. Garofalo Electric Co., Inc.

Teleprompter Manhattan Cable TV

~~150-42 12th Avenue~~

5120 Broadway

~~Whitestone N. Y. 10249~~

~~New York, N.Y. 10024~~

ATTN. QF;

~~Marvin Fields~~

[illegible]

Requested by:

Mailed

P.O. TOTAL	\$8,400.00
------------	------------

Approved By:

Approved
N.Y.

CONTROL NO. 9405

ESTIMATED PRICES	
TEM	PRICE
NO.	

IN BUDGET

☐ YES ☒ NO

YEAR 1985 PRIORITY CODE

BUDGET INFORMATION

BUDGET AMOUNT \$ _____ SPENT TO DATE _____ BALANCE _____

EXPENDITURE JUSTIFICATION

What: Internal conduit construction (conduit only)

Why: Owner insist on internal wiring.

Why Now: Purchase order must be issued now, building under construction. C-3 with system labor and material and sales protections to follow. Building will be occupied starting March 1981..

~~RECEIVED~~

~~JAN 30 1980~~

~~CONFIDENTIAL~~ EUGENE DEPT.

PURCHASING

DISTRICT

END.

1YST, ORV.

REGION

VIDEO

PRES.

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